No. 15994

In the United States Court of Appeals for the Ninth Circuit

CHARLES CROWTHER and IVY L. CROWTHER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE
Assistant Attorney General

LEE A. JACKSON
ROBERT N. ANDERSON
JAMES P. TURNER
Attorneys
Department of Justice
Washington 25, D.C.

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 161-175) are officially reported at 28 T.C. 1293.

JURISDICTION

This petition for review (R. 178-181) involves federal income taxes for the taxable years 1951 and 1954. On March 8, 1955, the Commissioner of Internal Revenue mailed to the taxpayer [1] notice of a

[1] The term taxpayer when used herein refers to Charles E. Crowther. His wife, Ivy L. Crowther, is a party only because joint returns were filed.

deficiency for the taxable year 1951 in the total amount of $324.76. (R. 8-11.) On January 12, 1956, the Commissioner mailed to the taxpayer notice of a deficiency for the taxable year 1954 in the total amount of $191.40. (R. 23-26.) Within ninety days thereafter and on May 11, 1955 and April 10, 1956, respectively, the taxpayer filed petitions with the Tax Court for a redetermination of these deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939 and Section 6213 of the Internal Revenue Code of 1954. (R. 1-6, 13-22.) The decisions of the Tax Court were entered November 29, 1957. (R. 176, 177.) The case is brought to this Court by a petition for review filed February 24, 1958. (R. 178-181.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

During the years in question the taxpayer used two personally owned automobiles and a jeep to make daily trips from his residence to job sites where he was employed in falling timber and sawing it into logs. The Tax Court found that the taxpayer used the automobiles and the jeep for the dual purpose of commuting to the job site and for transporting tools used in his trade or business, and, accordingly, allowed as a trade or business expense deduction only those operating expenses attributable to transporting the tools. The questions presented are:

1. Whether the taxpayer was entitled to a deduction for that portion of the operating expenses at-

tributable to using his vehicles to commute between his residence and his job site under the provisions of Sections 23(a) and 24(a) of the Internal Revenue Code of 1939 and Sections 162(a) and 262 of the Internal Revenue Code of 1954.

2. Whether the Tax Court had jurisdiction to consider alleged administrative and procedural irregularities which purportedly occurred before the issuance of the statutory notice of deficiency.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as disclosed by the evidence and found by the Tax Court (R. 163-171) are summarized below:

The taxpayers, Charles E. Crowther and Ivy L. Crowther, husband and wife, are residents of Fort Bragg, California, and filed timely income tax returns for the calendar years 1951 and 1954. During these years, Charles E. Crowther was employed as a "faller" which occupation consisted of "falling" trees and "bucking" or sawing them into marketable logs at a stated amount per thousand board feet of logs. The taxpayer's employer would designate a certain boundary of timberland or "layout" upon which the taxpayer was to work. When one layout was cut over, another site would be designated, and so on until the employer's logging operations were

completed or suspended. The taxpayer was not required to work any specified number of days per week, nor was he required to report at any particular hour on days when he did work. During the years involved the taxpayer's average gross income was approximately forty dollars for each day he worked. (R. 163.)

The taxpayer provided certain equipment used in his employment consisting of one chain saw, an extra bar and an extra chain for the saw, a gasoline can, springboards, gun sticks, axes, sledge hammers, from 4 to 14 wedges, and minor tools and spare parts for on-the-job repairs. He also provided lubricating oil for the chain saw and a safety hat and caulk boots for personal wear. (R. 164.)

At the end of a day's work the taxpayer took home his gasoline can and any tools or parts of tools that were broken and in need of repair or sharpening. Spare tools such as a spare sledge hammer and a spare axe and spare wedges ordinarily would not be removed from the taxpayer's automobile and would be transported back and forth daily. The chain saw and other equipment would be left overnight at the layout. (R. 164.)

Beginning about the middle of January 1951 and continuing until its annual suspension of logging operations shortly before Christmas of that year, the taxpayer was employed by Rockport Redwood Mills which has its offices in Rockport, California. Rockport is on the Pacific coast about twenty-nine miles north of the taxpayer's residence in Fort Bragg. During 1951 the taxpayer was assigned to work at

three layouts between thirteen and fifteen miles from Rockport. To reach these layouts the taxpayer traveled over a paved highway to Rockport and then over one of two alternative routes which necessitated some travel over unimproved private logging roads. Rockport Redwood Mills furnished the taxpayer gasoline for his chain saw but did not furnish transportation to the layouts. There was no public transportation available between the taxpayer's home and these layouts. (R. 164-165.)

In 1954 the taxpayer worked as a faller and bucker for two different companies. He worked for the H. A. Christie Company, Inc., of Ukiah, California, during the first part of 1954 and until July or August of that year when it completed its logging operations under the contract under which it had been operating. During this period the taxpayer was assigned work at two different layouts which were about four miles apart. To reach these layouts the taxpayer traveled about thirty miles south of Fort Bragg, about half this distance over a private logging road. The Christie Company did not provide transportation for its workers, nor was public transportation available. (R. 165-166.)

Within two or three days after the termination of his employment with the Christie Company, the taxpayer began working for Hildebrands, Inc., of Ukiah, California, where he continued to work for the remainder of 1954. During the first six weeks of this job the taxpayer worked at a layout which he reached by traveling over thirty-five miles of paved road and nine miles of logging road. For the

rest of the year he worked on another layout which he reached by driving over thirty-five miles of paved road and six miles of logging road. Hildebrands did not furnish transportation nor was public transportation available. (R. 166.)

Living accommodations were not available at the layouts where the taxpayer worked in 1951 and 1954. The taxpayer's employers did not impose any requirements as to where he and his family should live, nor did they specify the means he should employ in traveling to the layouts. Between jobs the taxpayer used his automobile to drive to various lumber mills to seek employment. (R. 166-167.)

In 1950 the taxpayer purchased for $2,805 a 1947 model Cadillac which he has owned throughout the years in issue. About July 1951 he bought for $125 a 1937 model Plymouth which was junked after being used for about a year. In November 1953 the taxpayer bought for $400 a jeep which he owned throughout 1954. During 1951 before acquiring the Plymouth, the taxpayer used the Cadillac to go to and from work. After purchasing the Plymouth, he generally used it for driving to work since the Cadillac was not well suited for driving over logging roads, but during periods when the Plymouth was inoperable, the Cadillac was used. In 1954 the taxpayer generally used the jeep to go to and from work occasionally exchanging rides with a fellow worker who owned a jeep. On other occasions when the jeep was not operating, the taxpayer used the Cadillac. When the Cadillac was not being used by the taxpayer, Mrs. Crowther used it for shopping and

other personal reasons. The taxpayer generally worked six days a week in 1951 and five days a week in 1954. (R. 167-168.)

In their joint income tax returns for the years 1951 and 1954 the taxpayer and his wife reported a loss from rents and royalties of $1,974.81 and $837.97, respectively, which they deducted in computing taxable income. In "Schedule F.—Income from Rents and Royalties" it was stated that a portion of the taxpayer's wages during these years was for chain saw and equipment rental. The remainder of these schedules consisted of deductions claimed to be attributable to this rental income. The Tax Court found that during both years the taxpayer at all times kept possession of his chain saws and other equipment and used it himself in the course of his employment. He did not rent equipment to anyone during those years. (R. 168-170.)

The business expense deductions thus claimed by the taxpayer, those allowed by the Commissioner and the deductions allowed by the Tax Court are summarized below (R. 8-11, 23-26, 169-171):

	Claimed by Taxpayer	Allowed by Commissioner	Found by Tax Court
1951			
Cadillac depreciation	$701.00	$140.20	$210.00
Saw and equipment repairs	519.31	173.10 [2]	519.31
Gas and oil	245.55	77.46	140.00
Insurance	141.75		42.00
Cost of Plymouth	125.00	0	30.00
Casualty Insurance	108.00 [3]	0	28.00
1954 [4]			
Cadillac depreciation	$702.00	$ 0	$ 70.00
Jeep depreciation	200.00	188.06	188.06
Jeep repairs	113.06		
Saw repairs	225.00	225.00	225.00
Parts	301.66	301.66	301.66
Gas	327.26	327.26	327.26
Oil	43.17	43.17	43.17
Insurance	92.80	92.80	92.80

The Tax Court's allowance of business expense deductions for the use of the taxpayer's automobiles and jeep was based on its finding that, with respect to his employment, the taxpayer used these vehicles for a dual purpose, i.e. commuting to and from work

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[2] These costs were capitalized by the Commissioner and $173.10 was allowed as a depreciation deduction. (R. 169.)

[3] Claimed by the taxpayer as a casualty loss. (R. 169-170.)

[4] With respect to the 1954 return, the Commissioner also disallowed $33.08 of the $44.20 which the taxpayer claimed as a deduction for medical expenses and disallowed a $65 deduction for the preparation of a 1953 tax return. The Tax Court allowed the latter deduction and these matters are no longer in issue. (R. 171.)

and transporting tools used in his trade or business. Accordingly the Tax Court allowed a deduction for that portion of the expenses attributable to the latter purpose. (R. 172, 174.)

Based on these allowances the Tax Court redetermined the amount of the alleged deficiencies and entered decisions that there was a deficiency for the year 1951 of $195.18 and an overpayment for the year 1954 of $293.86. (R. 176, 177.)

In his petitions to the Tax Court (R. 1-7, 13-22) the taxpayer alleged in sweeping terms that the Commissioner and his agents had willfully committed major administrative and procedural indiscretions in waging "a campaign in the petitioners' locality in which the conduct, actions, and timing were abusive, arrogant, and decitful" (R. 3), and praying that the allegedly arbitrary deficiencies be rejected in toto. The taxpayer introduced no evidence to support these charges other than an oral stipulation (R. 31) that the taxpayer did not receive a notice of proposed deficiency (30 day letter). On these facts the Tax Court found that it was without jurisdiction to consider such charges. (R. 175.)

SUMMARY OF ARGUMENT

I

The facts unequivocally show that during the years in issue the taxpayer used two automobiles and a jeep for the dual purpose of commuting to his usual place of employment and of transporting tools used in his trade or business. Under the applicable

sections of the Internal Revenue Codes the deductibility of automobile expenses is controlled by the purpose for which they were incurred and by their relationship to the taxpayer's trade or business. The cases clearly hold that commuting expenses are personal and not deductible. However, where such expenses have a dual purpose, a reasonable allocation must be made in order to compute the correct amount of the deduction, and the Tax Court's determination in this regard is without error.

The taxpayer incorrectly argues that the portion of automobile expenses attributable to commuting are deductible expenses incurred in travel "while away from home" under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 and Section 162(a)(2) of the Internal Revenue Code of 1954. "Home" within the meaning of these statutory provisions is the taxpayer's usual place of employment or post of duty, not his residence.

Similarly, while an exception to the general rule has been recognized in certain cases where a taxpayer travels between his residence and a temporary job site, the exception has no application here. The taxpayer in this case was not working at temporary job sites, but was engaged in logging activities at his usual post of duty or place of employment.

II

The taxpayer was not prejudiced because he was not furnished a so-called "30 day letter" or an auditor's report. These matters are part of the administrative procedures preliminary to the issuance of

a statutory notice of deficiency and have no pertinence to the problem before the Tax Court. The Tax Court's jurisdiction is limited to a redetermination of deficiencies stated in the statutory notice and it cannot allow a taxpayer to avoid payment of tax because of alleged ministerial shortcomings or irregularities.

ARGUMENT

I

The Tax Court Correctly Held That the Portion of Vehicle Operating Expenses Incurred In Commuting Between the Taxpayer's Residence and His Job Was a Nondeductible Personal Expense Under Section 24(a) of the Internal Revenue Code of 1939

This case concerns certain expenses incurred by the taxpayer in making daily trips from his residence in Fort Bragg, California, to and from certain "layouts" in the surrounding woods. The taxpayer was employed at these layouts as a faller and bucker—that is, he was engaged in falling trees and "bucking" or sawing them into logs of marketable size. The facts unequivocally show that the taxpayer used two automobiles and a jeep in commuting to his work at these sites. (R. 163, 166-168.)

Section 24(a)(1) of the Internal Revenue Code of 1939, Appendix, *infra*,[5] provides that personal, living or family expenses shall not be allowed as deductions in computing net income "in any case". Con-

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[5] This provision was carried over without substantive change to the 1954 Code, Section 262 (Appendix, *infra*), which is applicable here to the year 1954.

sistent judicial and administrative authority have long held that the expenses which a taxpayer incurs in traveling to and from his regular place of employment are personal expenses which fall within the ban of this provision. Treasury Regulations 111, Sec. 29.23(a)-2, Appendix, *infra;* Treasury Regulations on Items Not Deductible (1954 Code), Section 1.262-1(b)(5), Appendix, *infra; Commissioner* v. *Flowers*, 326 U.S. 465, rehearing denied, 326 U.S. 812; *Commissioner* v. *Peurifoy*, 254 F. 2d 483 (C.A. 4th), affirmed *per curiam*, 358 U.S. 59; *Donnelly* v. *Commissioner*, 262 F. 2d 411 (C.A. 2d); *Commissioner* v. *Janss*, 260 F. 2d 99 (C.A. 8th); *Ney* v. *United States*, 171 F. 2d 449 (C.A. 8th), certiorari denied, 336 U.S. 967; *York* v. *Commissioner*, 160 F. 2d 385 (C.A. D.C.).

In this case it was also established that in addition to using his vehicles to commute to and from work, the taxpayer furnished certain tools and equipment which he used on this job and that he carried such material to and from the job site in his car or jeep. (R. 164.) Accordingly, the Tax Court found that the taxpayer used these vehicles for the dual purpose of commuting to and from work and for transporting tools used in his trade or business. (R. 172.) Because the vehicles were used for this latter purpose, both the Commissioner and the Tax Court recognized that a portion of the operating expenses incurred by the taxpayer were deductible under Section 23(a)(1)(A), Appendix, *infra*, as ordinary and necessary expenses incurred by the taxpayer in carrying on a trade or business. In this respect the

Tax Court increased some of the allowances made by the Commissioner, stating (R. 174):

> In allowing a portion of the deductions taken for automobile and jeep expenses, the respondent has recognized, and we think properly so, that the automobiles and jeep, in addition to being used by Crowther to commute between his home and the various "layouts" at which he worked, also were used by him in his business or trade. In our opinion, the record, in some instances, warrants the allowance for such use of larger amounts than were allowed by the respondent. In those instances, we have found as best we could the amounts which constituted ordinary and necessary business expenses.

Whether a particular expense is deductible by a taxpayer depends, of course, on the purpose for which it was incurred, and, where there is more than one purpose, it is entirely proper to make a reasonable allocation in order to compute the correct allowance for expenses deductible under the statute. *Wagner* v. *Lucas*, 38 F. 2d 391 (C.A. D.C.); *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1st); *Bartholomew* v. *Commissioner*, 4 T.C. 341, appeal dismissed, 151 F. 2d 534 (C.A. 9th). In this case the Tax Court has made a permissible allocation on the facts of record.

In this Court the taxpayer apparently does not question the correctness of the finding that there was a dual purpose prompting these expenditures, nor does he raise objection to the proportionate amounts allocated by the Tax Court to each of these purposes. Rather, as we understand the argument, the taxpayer

urges that the portion of automobile and jeep expenses attributable to commuting to and from work is deductible under Section 23(a)(1)(A) as "traveling expenses * * * while away from home in the pursuit of a trade or business." In order to satisfy his burden of proving that he is entitled to this deduction,[6] the taxpayer advances the theory that his residence in Fort Bragg was actually his "business headquarters" and was, therefore, his "tax home", so that each trip to the woods was travel "away from home" to a "temporary job site," resulting in deductible expenses under the theory advanced in cases such as *Schurer* v. *Commissioner*, 3 T.C. 544, and *Leach* v. *Commissioner*, 12 T.C. 20. The weakness of the taxpayer's theory lies not in the lack of validity of the cited case authority, but in the assumed applicability of this authority to these facts.

The Supreme Court has twice considered and rejected deductions for travel expenses claimed under similar theories. *Commissioner* v. *Flowers*, *supra*; *Peurifoy* v. *Commissioner*, 358 U.S. 59. In the *Flowers* case, the problem was considered in detail and the factual prerequisites for applicability of this deduction provision were carefully enumerated. These requirements are (p. 470):

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[6] The allowance of a deduction from gross income, of course, "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440; *Sparkman* v. *Commissioner*, 112 F. 2d 774, 778 (C.A. 9th). The burden of proving facts which show a right to the claimed deduction and to the amount claimed is upon the taxpayer. *Burnet* v. *Houston*, 283 U.S. 223.

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.[7]

It is clear that expenses incurred in driving between one's residence and his usual place of employment are not incurred "while away from home." It has been repeatedly recognized that " 'home' as used in the statute means the taxpayer's principal place of business or employment." *O'Toole* v. *Commissioner*, 243 F. 2d 302, 303 (C.A. 2d). See also *Commissioner* v. *Janss, supra; Ney* v. *Commissioner, supra; Claunch* v. *Commissioner* (C.A. 5th), decided March 10, 1959 (3 A.F.T.R. 2d 906); *York* v. *Commissioner, supra; Bercaw* v. *Commissioner*, 165 F 2d 521 (C.A. 4th). That is, it is beyond dispute that "home" as used in Section 23(a)(1)(A) means

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[7] The Commissioner does not contend that the Supreme Court's decision in the *Flowers* case holds that the travel expenses of an employee are allowable as business deductions only where they are incurred in pursuit of his employer's business.

a taxpayer's post of duty, and not necessarily the place where he chooses to maintain a residence. Therefore, when a taxpayer is employed at his post of duty, he is not "away from home," and hence not entitled to deduct traveling expenses. In such a case, his expenditures for meals and lodging must be considered personal and living expenses which as pointed out above are made, expressly non-deductible under Section 24(a)(1) of the 1939 and Section 262 of the 1954 Codes. (Appendix, *infra.*) *Hammond* v. *Commissioner*, 20 T.C. 285, affirmed 213 F. 2d 43 (C.A. 5th); *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1st), certiorari denied, 343 U.S. 926; cf. *Commissioner* v. *Moran*, 236 F. 2d 595 (C.A. 8th).

The logic of the above rule seems inescapable. If a taxpayer's residence is his home within the meaning of this provision, then everyone's expense of getting to and from his work would be deductible under the statute, and in this context, the statutory prohibition against the deductibility of personal expenses would be deprived of all meaning. Moreover, this definition of "home" has not only received repeated judicial approval, but, as the Supreme Court noted in *Flowers* (fn. 5, p. 472), it is an administrative definition published as early as 1921. This administrative definition has been continued since the *Flowers* case,[8] and has survived numerous statutory

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[8] I.T. 3842, 1947-1 Cum. Bull. 11; Rev. Rul. 54-147, 1954-1 Cum. Bull. 51; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul. 55-236, 1955-1 Cum. Bull. 274; Rev. Rul. 55-571, 1955-2 Cum. Bull. 44; Rev. Rul. 55-604, 1955-2 Cum. Bull. 49; Rev. Rul. 56-49, 1956-1 Cum. Bull. 152.

reenactments.[9] Accordingly this long-standing administrative and judicial definition must be regarded as having received implied congressional approval. *Helvering* v. *Winmill*, 305 U.S. 79; *Taft* v. *Commissioner*, 304 U.S. 351; *Brewster* v. *Gage*, 280 U.S. 327. Indeed, this definition of "home" was brought forcefully to the attention of Congress. Prior to 1952, it was established that the "home" of members of Congress was in Washington, D. C., even though their family residences were located elsewhere. *Lindsay* v. *Commissioner*, 34 B.T.A.. 840. Accordingly special legislation was required in order to view a Congressman's residence as his home for purpose of Section 23(a)(1)(A). Legislative Branch Appropriation Act, 1953, c. 598, 66 Stat. 464, 467.[10] A similar provision was included in Section 162 of the 1954 Code, Appendix, *infra*. It is submitted that since the taxpayer in the instant case is not covered

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[9] Section 214(a)(1) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9); Section 23(a) of the Revenue Acts of 1928 (c. 852, 45 Stat. 791), 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447).

[10] This provides in pertinent part—

> That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State; congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purpose of section 23(a)(1)(A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

by any such special provision his tax "home" must be regarded as his principal post of duty—i.e. the logging layout in the woods. Travel expenses incurred in commuting from one's residence to and from his principal post of duty is, as noted above, a nondeductible personal expense. Treasury Regulations 111, Section 29.23(a)-2, Appendix, *infra;* Treasury Regulations on Items Not Deductible (1954 Code), Section 1.262-1(b)(5), Appendix, *infra; Commissioner* v. *Flowers*, *supra; Ney* v. *Commissioner*, *supra.* Further, it is urged that the above authorities negative completely the taxpayer's suggestion (Br. 22) that under this Court's decision in *Wallace* v. *Commissioner*, 144 F. 2d 407,[11] his "home" for the purpose of this deduction is his residence in Fort Bragg.

The taxpayer suggests (Br. 18) that since it was impossible for him to live closer to his work, a "business necessity" for these commuting expenses has been supplied. As a practical matter, it is impossible

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[11] The *Wallace* case involved a taxpayer who lived in San Francisco, but for several months in 1939 worked on a movie in Hollywood. It was held that she was entitled to deduct the costs of food, rent and household expenses incurred in Hollywood as travel expenses while away from home. Even despite the opinion's suggestion that "home" on these particular facts means residence, we submit that the opinion cannot be stretched so far as to allow commuting expenses as travel expenses while away from home. Actually, the *Wallace* opinion has never been accepted as a ruling that *in all circumstances* home means residence. We have been able to find only one case which cites it for that proposition, and in that case the deductions were denied for failure of proof. *Summerour* v. *Allen,* 99 F. Supp. 318 (M.D. Ga.).

for almost all commuters today to live close to their work. That is why we are daily witnessing the spectacle of millions of people traveling long distances by train and automobile to get to their work in the morning and back to their residences at night. But regardless of the distances these people may be called upon to travel every day, they remain commuters, and hence, in the sight of the statute and Regulations, such expenses are personal. Just as all employees have to have food and lodging, so must they make suitable arrangements for getting to and from work. The travel undertaken daily by the taxpayer here to get to and from his work was the result of his personal necessity to establish a residence where a residence was available. Personal necessity does not control the allowance of business deductions. Compare *Commissioner* v. *Moran, supra; Commissioner* v. *Doak,* 234 F. 2d 704 (C.A. 4th); *United States* v. *Woodall,* 255 F. 2d 370 (C.A. 10th), certiorari denied, 358 U.S. 324.

The second case which has been before the Supreme Court on the question here involved, *Peurifoy* v. *Commissioner, supra,* brings into focus the exception to the general rule relied on by the taxpayers herein. In that case the taxpayers were construction workers whose jobs were at Kinston, North Carolina, and whose personal residences were elsewhere in the State. In their tax returns they deducted amounts expended for transportation from Kinston to their personal residences and for food and lodging expenses at Kinston. In allowing the deductions, the Tax Court (29 T.C. 149) recognized an exception to

the general rule that a taxpayer's principal post of duty is his tax "home" which is to the effect that when that post of duty is temporary his family residence may be his tax "home" and travel expenses to and from his temporary post may be deductible. See *Leach* v. *Commissioner*, 12 T.C. 20; *Schurer* v. *Commissioner*, 3 T.C. 544. However, in the *Peurifoy* case the Court of Appeals for the Fourth Circuit (254 F. 2d 483) reversed as clearly erroneous the Tax Court's finding that the employment was temporary and held the expenses were not deductible, stating (pp. 486-487):

> However justified he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary business expense within the meaning of § 23(a)(1)(A) if the employment is of substantial or indefinite duration.

The Supreme Court affirmed, stating that the Court of Appeals had made a fair assessment of the record.

We have reviewed the litigation in the *Peurifoy* case in some detail in order to demonstrate that the rule relied on by the Tax Court in that case and in similar cases is a strictly construed exception to the general rule prohibiting the deduction of personal expenses. See *Claunch* v. *Commissioner*, *supra*; *Commissioner* v. *Janss*, *supra*. Accordingly, the exception has no pertinence in cases such as this where the taxpayer was not assigned to a temporary post of duty away from his primary post, but was merely com-

muting from his residence to his regular job site.

Also contrary to the taxpayer's suggestion there is nothing in administrative rulings which would sanction the deductibility of the commuting expenses involved in this case. Indeed, in Treasury Publication No. 300 (1956 P-H Federal Taxes, par. 76,425), upon which taxpayer relies (Br. 27-28), the distinction is clearly made:

> 10. Question: I live in Nashville. I am regularly employed at a location 20 miles outside of the city. There are no living accommodations within a reasonable distance of my place of employment. May I deduct my expenses of traveling to and from work?
>
> Answer: No. Expenses of getting to and from your regular place of employment are not deductible, regardless of the distance you commute.
>
> 11. Question: I live in Nashville and work for a construction company. Most of the time I work in the general area of Nashville. I have been temporarily assigned to work on a project about twenty miles from Nashville. I make daily round trips from my residence to this temporary job. May I deduct my transportation expense in making these daily round trips?
>
> Answer: Yes. Provided your employer does not make free transportation to this temporary job available to you. These expenses of getting to and from your temporary assignment are deductible because your work is temporary and is outside the general area in which you usually work.

It is submitted that the taxpayer here has failed to adduce facts calling for the application of the temporary employment rule. To bring himself within this ameliorative exception, the taxpayer must not only show that his employment was actually short, but also that prior to its commencement it was anticipated to be short. *Ford* v. *Commissioner*, decided November 30, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,314), affirmed *per curiam*, 227 F. 2d 297; *Albert* v. *Commissioner*, 13 T.C. 129. Here, the taxpayer testified that his jobs lasted until he was laid off or until the employer had finished supplying logs under a contract. (R. 59-60, 72-73, 79.) He was employed by Rockport Redwood Mills for the entire taxable year of 1951, and in 1954 worked for Christie Company until July or August and finished the year working for Hildebrands, Inc. (R. 164, 165.) This latter job extended into 1955. (R. 166.) Thus, the jobs held by the taxpayer during these years were of substantial duration and were indefinite rather than temporary in contemplation. *Commissioner* v. *Peurifoy*, *supra*; *Claunch* v. *Commissioner*, *supra*.

The taxpayer's reliance (Br. 16-18, 20-21) on *Emmert* v. *United States*, 146 F. Supp. 322 (S.D. Ind.), and *Moss* v. *United States*, 145 F. Supp. 10 (W.D. S.C.), is similarly misplaced. These cases are limited to the situation where a taxpayer could live closer to his work but for a state law requirement that he live in a particular district and work in another. The commuting expenses incurred in situations of this type do not arise from the personal necessity of getting to and from work. They are

a necessary by-product of the legal requirement of state law that the taxpayer live in one place and work in another. The principle has no application here.

The taxpayer on brief (p. 30) has admonished us not to cite cases regarding the non-deductibility of commuting expenses, but requests authority to establish "that a taxpayer who must travel daily a distance of from 30 to 44 miles from his 'tax home' to a temporary job-site and return cannot deduct the cost of such transportation." Such statements show that the taxpayer's theory is premised on a distorted view of this record. The taxpayer here did not travel from his "tax home"—he traveled from his residence. He did not go to a "temporary job-site"—he went to his usual and principal place of employment or post of duty. He cannot deduct the costs of this travel because they are personal expenditures incurred in getting to and from work, and, as the Supreme Court stated in *Flowers*, (p. 473) the nature of the expenses remains the same whether a taxpayer travels three blocks or three hundred miles.

II

The Fact that the Taxpayer Was Not Furnished An Auditor's Report or a 30 Day Letter Was Not Prejudicial To His Rights

As we understand the taxpayer's argument on this point, it is that since the Commissioner did not issue a letter advising tenatively of a proposed deficiency (so-called 30 day letter) or furnish the taxpayer with an auditor's report (R. 31), the Tax Court should

have approved the taxpayer's returns as filed regardless of its conclusion that the taxpayer in fact owed more tax than he had reported. Such a proposal is without rational or legal justification.

The function of the Tax Court in cases such as this is to redetermine deficiencies officially determined by the Commissioner as set forth in the statutory notice of deficiency. It is the statutory notice, not the 30 day letter, which is the Commissioner's final determination and which confers jurisdiction on the Tax Court. Section 6213 of the Internal Revenue Code of 1954; Section 272(a) of the Internal Revenue Code of 1939; see *Commissioner* v. *Gooch Co.*, 320 U.S. 418. The existence or non-existence of an auditor's report, a 30 day letter, a ten day letter or any other matters of preliminary administrative activity is immaterial to the problem presented to the Tax Court *viz.* the redetermination of the deficiency in tax determined by the Commissioner.

In this case the Tax Court placed no reliance on the presumptive correctness of the Commissioner's determination, but redetermined from the facts presented to it the amount of income tax owed by this taxpayer. Contrary to the taxpayer's suggestion (Br. 33), there is no basis for the application in this context of the rule of *Helvering* v. *Taylor*, 293 U.S. 507. That rule is that when it is apparent on the facts that the Commissioner's determination is based on a formula which could not produce the correct amount of the tax, the erroneous deficiency will not be upheld because the taxpayer fails to prove the

amount of the tax due. As was recently stated by the Court of Appeals for the Seventh Circuit "The rule of *Helvering* v. *Taylor* does not prevent the Tax Court from exercising its function, in a proper case, of redetermining the deficiencies assessed by the Commissioner." *Zeddies* v. *Commissioner*, decided February 20, 1959 (3 A.F.T.R. 2d 724, 728).

The taxpayer's petitions to the Tax Court (R. 1-7, 13-22) contain a great many allegations concerning the manner in which the deficiencies were determined in this case, all of which were denied in the answers (R. 12, 27). It was alleged, *inter alia*, that the Commissioner knowingly issued false and arbitrary deficiency notices as a part of a campaign to force the wage earners of Mendocino County to use the standard deduction and to cast the taxpayer's tax consultant into disrepute. The most noteworthy thing about these allegations is the total lack of any attempt to substantiate them with either testimony or documentary evidence. Moreover, the propriety of the Commissioner's motives, policies and procedures has long been held to be outside the Tax Court's jurisdiction to redetermine deficiencies. *Kerr* v. *Bowers*, 66 F. 2d 419, 424 (C.A. 2d), certiorari denied *sub nom. Clegg* v. *Bowers*, 291 U.S. 663; *Cleveland Home Brewing Co.* v. *Commissioner*, 1 B.T.A. 87, 91. If the taxpayer feels aggrieved by such activity his remedy must lie elsewhere. *Greene* v. *Commissioner*, 2 B.T.A. 148. There is nothing in the revenue laws that excuses a taxpayer from paying a lawful tax on the ground of alleged administrative shortcomings or irregularities.

CONCLUSION

For the reasons stated above, the decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE
Assistant Attorney General

LEE A. JACKSON
ROBERT N. ANDERSON
JAMES P. TURNER
Attorneys
Department of Justice
Washington 25, D.C.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * traveling expenses (including the entire amount expended for meals and lodg-

ing) while away from home in the pursuit of a trade or business; * * *.

* * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [As amended by Section 127 (b), Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Internal Revenue Code of 1954:

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * * *

(2) *Trade and Business Deductions of Employees.*—

* * * *

(B) *Expenses for travel away from home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter no deduction shall be allowed for personal, living, or family expenses.

(26 U. S. C. 1952 ed., Supp. II, Sec. 262.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(a)-2 [as amended by T.D. 5458, 1945 Cum. Bull. 45] *Traveling expenses.*—

Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging are business expenses.

* * * *

A payment for the use of a sample room at a hotel for the display of goods is a business expense. Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. A taxpayer claiming the benefit of the deductions referred to herein must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the tax-

able year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

Commuters' fares are not considered as business expenses and are not deductible.

Treasury Regulations on Itemized Deductions for Individuals and Corporations (1954 Code):

Sec. 1.162-2 *Traveling expenses.*— * * *

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * *

Treasury Regulations on Items Not Deductible (1954 Code):

Sec. 1.262-1 *Personal, living, and family expenses*—(a) *In General.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Internal Revenue Code of 1954, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.*

* * * *

(5) * * * The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses. Except as permitted under section

162 or 212, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

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